

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>LATASHA THOMAS,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>JO ANNE B. BARNHART,</b>	:	
<b>Commissioner of the Social Security</b>	:	
<b>Administration,</b>	:	
<b>Defendant</b>	:	<b>No. 02-2958</b>

**MEMORANDUM**

**Norma L. Shapiro, S.J.**

**June 11, 2003**

This action was brought pursuant to 42 U.S.C § 405(g) to review the final decision of the Commissioner of Social Security (“Commissioner”) denying Latasha Thomas’ claim for disability insurance benefits (“DIB”) and supplemental security income (“SSI”) benefits under Titles II and XVI of the Social Security Act (“Act”), 42 U.S.C. §§ 401-433, 1381-1383. Before the court are cross-motions for summary judgment. After de novo consideration of the Report and Recommendation (“R & R”) of Magistrate Judge Peter B. Scuderi, to whom the motions were referred, and plaintiff’s objections thereto, Judge Scuderi’s recommendation will be approved and adopted. Plaintiff’s motion for summary judgment will be denied, Defendant’s motion for summary judgment will be granted, and the final decision of the Commissioner will be affirmed.

**I. . PROCEDURAL HISTORY<sup>1</sup>**

On March 17, 2000, plaintiff, filing an application for DIB and SSI benefits, claimed disability since March 30, 1999, because of right shoulder pain and depression.

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<sup>1</sup> Adopted in part from the comprehensive overview of procedural facts contained in Judge Scuderi’s R&R.

(R. 13 – 14). Her application was denied initially and upon reconsideration. At plaintiff's request a hearing was held before an Administrative Law Judge ("ALJ"), on July 5, 2001. (R. 34-66). The ALJ's denial of her claim on October 25, 2001, was the final decision of the Commissioner since the Appeals Council denied plaintiff's request for review. (R. 13-21). See 20 C.F.R. § 404.1484 (d), 416.984 (d). Plaintiff timely filed this action for judicial review. Cross-motions for summary judgment were referred to Magistrate Judge Scuderi, who recommended that defendant's motion for summary judgment be granted; plaintiff has filed objections to the R&R.

## II. . **FACTS**<sup>2</sup>

Plaintiff was twenty-five years old at the time of the administrative hearing, and lived alone with her three children. She testified that she completed school through the tenth grade and failed to obtain a GED. (R. 39-40). Her past relevant work was as a clerk at The Home Depot. (R. 62).

On March 29, 1999, plaintiff suffered a work-related injury to her right shoulder, and has complained of persistent pain since the accident. (R. 147-148). The following day she sought emergency room care for the injury. X-rays revealed no evidence of significant bone, joint, or soft tissue abnormality and she was diagnosed with a right shoulder contusion by Michael J. Reihart, D.O. (R. 246, 179).

Dr. James H. Carson, an orthopedic specialist, examined the plaintiff and reported that an MRI did not show any sign of rotator cuff or labral tear, he also noted that a bone scan showed no shoulder pathology and nerve conduction was normal. Dr. Carson stated that "it is clear that nothing will require orthopedic intervention", and he recommended

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<sup>2</sup> Adopted in part from the comprehensive overview of facts contained in Judge Scuderi's R&R.

physical therapy. He also noted that at the time of examination her mood and affect were appropriate. (R. 187, 188, 193).

Dr. David Polin, a rehabilitation specialist, who examined plaintiff multiple times, reported that the plaintiff complained of shoulder pain and dysesthesia. He found plaintiff had a limited range of motion, but normal electro diagnostic tests not consistent with carpal tunnel syndrome or any other abnormality. The doctor also noted that plaintiff's symptoms had progressed to include her right hip, and she was having difficulty sleeping. Dr. Polin also reported that an MRI and bone scan of the right upper extremity including the shoulder were unremarkable. Upon examination, Dr. Polin found that plaintiff did not have any clear pattern of motor deficit, and that her sensation and deep tendon reflexes were intact. He diagnosed right shoulder contusion progressing to chronic pain syndrome, possibly developing complex regional pain syndrome. (R. 223-226).

On June 29, 1999, Dr. Carson completed a work outline for plaintiff's employer in which he stated that plaintiff could return to work with certain restrictions. (R. 268).

Plaintiff was admitted to Lancaster Health Alliance ("LHA") on July 16, 1999, for possible manipulation under anesthesia to determine whether she had a frozen shoulder. Upon examination, Dr. James Artuso, noted that plaintiff was in no acute distress; her neck range of motion was normal with minimal exacerbation of pain; but that she had severe tenderness to the right upper trapezius musculature. plaintiff's range of motion of her hand and elbow appeared intact, and she displayed slight decreased motor strength in her right upper extremity. He also indicated that the right shoulder had a full range of motion while under anesthesia. (R. 412-414)

On September 17, 1999, plaintiff was examined by Dr. Arpad Zolyomi in the Pain Medicine and Palliative Care Center. Plaintiff was noted to have extreme difficulty in describing her pain and complained of vague weakness in the right hand. The doctor reported that she seemed significantly worse during the exam than when he had observed her walking into his office. Plaintiff used both hands freely while talking and exhibited no evidence of restriction in the right elbow or wrist. Plaintiff staggered when asked to walk, yet she had walked into the office normally. Dr. Zolyomi reported that plaintiff lifted herself up on both hands without apparent difficulty and had no sensory or deep tendon reflexes. The doctor diagnosed plaintiff with right upper and lower extremity pain from disuse syndrome, and psychological stressors, and opined that plaintiff's symptoms did not suggest chronic regional pain syndrome. He also stated that plaintiff declined his suggestion to undergo psychological evaluation, because of transportation problems. (R. 392-394).

Plaintiff continued to seek treatment with Dr. Polin. On October 18, 1999, the doctor reported right-sided dysfunction and tenderness to light palpation. Dr. Polin diagnosed plaintiff with myofascial pain with psychological factor affecting physical condition, and explained to plaintiff that the continuation of her pain was due to a stress related illness. The doctor also stated that he wanted to wean her from Oxycontin, which she did not take consistently. (R. 231-233).

On February 9, 2000, Dr. John Perry, an orthopedic specialist retained by her employer's workers' compensation carrier, conducted an independent medical examination of plaintiff. Plaintiff told Dr. Perry that she had gone to college for medical technology and computer work, and that she earned a CPT degree. Upon examination,

plaintiff was alert and oriented. Dr. Perry reported that plaintiff had numerous “bizarre” complaints. He noted that fracture or soft tissue injury had been ruled out by various diagnostic tests; she moved quite easily when not thinking about her shoulder and when not being examined; and did not have any atrophy or evidence of rotator cuff pathology. Dr. Perry diagnosed plaintiff with right shoulder contusion and non-physiologic symptom enhancement, he opined that she had fully recovered from her shoulder contusion and could return to work without restrictions. (R. 211). The ALJ noted that since Dr. Perry was retained for the purposes of a compensation evaluation “his assessment may not be the most impartial.” (R. 18).

On April 3, 2000, Dr. Polin stated stress and disuse contributed to a prolongation of plaintiff’s condition, and opined that her condition was fully disabling. (R. 240). In June, 2000, Dr. Polin noted that plaintiff’s symptoms had not changed, but that she moved her right upper and lower extremities better and was walking better. (R. 360). In July, 2000, plaintiff continued to complain of pain, but reported to Dr. Polin she felt better on Zoloft. Upon examination, she complained of pain with range of motion of the right shoulder, but the doctor noted that she used her hand more and was walking with less of a limp. He diagnosed depression and chronic pain syndrome. Dr. Polin suggested physical therapy 3 to 5 times per week. He also stated that plaintiff gave excuses for not seeing a psychologist, such as lack of transportation and time of day availability. (R. 361). In September, 2000, Dr. Polin advised plaintiff, once again, to seek psychiatric consultation for depression, and again she did not. (R. 362). On December 7, 2000, Dr. Polin reported that plaintiff seemed less depressed, her physical condition had not worsened, and she had experienced some improvement. (R. 367).

Plaintiff testified that she experiences persistent right shoulder pain and stress trying to care for her children. Her medications include Zoloft and Vioxx, which plaintiff reported makes her drowsy. She described her daily activities as consisting of caring for her children, light cooking and cleaning, grocery shopping, and reading. (R. 42-48, 50).

At the July 5, 2001, administrative hearing James Ryan testified as a vocational expert (“V.E.”). The ALJ stated that plaintiff’s past relevant work as a sales clerk is classified as unskilled and performed at a medium level of exertion. The V.E. was asked to assume an individual of the same age, education and past work experience as plaintiff; who: could lift fifteen to twenty pounds with her non-dominant left hand and less than ten pounds with her right hand; was required to change positions from sitting to standing every twenty to thirty minutes; could walk one or two blocks; and could do light cooking, cleaning, and laundry. The V.E. testified that although such an individual could not perform plaintiff’s past relevant work, she could perform unskilled and light jobs such as packer, packaging worker, clerical worker and machine tender. The ALJ concluded that plaintiff is capable of making a successful adjustment to work that exists in significant numbers in the national economy. (R. 61-64).

### III. STANDARD OF REVIEW

Judicial review of the Commissioner’s final decision is limited. The district court is bound by the findings of the Commissioner if decided according to correct legal standards and the record, as a whole, provides substantial evidence to support them.

Allen v. Bowen, 881 F.2d 37, 39 (3d Cir. 1989); Schaudeck v. Comm’r of Soc. Sec. Admin., 181 F.3d 429 (3d Cir. 1999). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales,

402 U.S. 389, 407 (1971). The court will review de novo those portions of the Magistrate Judge's R&R to which the plaintiff has filed objections. See 28 U.S.C. § 636 (b) (1). The court may accept, reject or modify, in whole or in part, the findings and recommendations made.

#### IV. **DISCUSSION**

Under the Social Security Act, a person is “disabled” for the purpose of SSI eligibility if she is unable to “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 423 (d) (1) (A); 20 C.F.R. §§ 404.1505 (a) and 416.905 (a). The applicant has the burden of proving disability. Id. at 423 (d) (5). Once she establishes an inability to perform prior work, the burden shifts to the Commissioner to show that the claimant can perform other substantial gainful work existing in the national economy. See Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999).

Using the five step sequential evaluation to assess disability claims<sup>3</sup>, as promulgated by the Commissioner under the medical-vocational regulations of the Act, the ALJ concluded that plaintiff is not entitled to a period of disability, DIB and SSI benefits. This decision was based on his findings that: plaintiff's chronic pain syndrome is a severe impairment, based upon requirements in the regulations; this medically determinable impairment does not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4; plaintiff's allegations regarding her limitations are not totally credible for reasons set forth; plaintiff has residual functional capacity to perform a significant range of light work; and although plaintiff's exertional limitations do not allow her to perform the full range of light work, there are a number of jobs in the national economy that she could perform.

Plaintiff objects to the Magistrate Judge's recommendation that the decision of the ALJ be upheld and the plaintiff's Motion for Summary Judgment be denied. She claims that that the decision was not supported by substantial evidence. Specifically, she claims that the ALJ committed legal errors in: failing to analyze plaintiff's mental

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<sup>3</sup> These steps are as follows:

- 1) If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
- 2) If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience.
- 3) If you have an impairment(s) which meets the duration requirement and is listed in appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.
- 4) If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.
- 5) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot we will find you disabled. 20 C.F.R. §§ 404.1520 (b) - (f), 416.920 (b) - (f).



impairment properly, according inadequate weight to the opinions of plaintiff's treating physician, and finding plaintiff less than fully credible.

A. **Proper analysis of mental impairment**

Magistrate Judge Scuderi was correct in finding that the ALJ properly determined plaintiff's depression was not severe. Step two of the sequential evaluation focuses on whether the claimant is suffering from a severe impairment. 20 C.F.R. §§ 404.1520 (c), 416.920 (c). An impairment is severe if it is "of magnitude sufficient to limit significantly the individual's ability to do basic work activities." Santise v. Schweiker, 676 F.2d 925, 927 (3d Cir. 1982); see also 20 C.F.R. §§ 404.1521 (a), 416.921 (a); S.S.R. 96-3p, "Considering Allegations of Pain and Other Symptoms in Determining Whether a Medically Determinable Impairment is Severe." A non-severe impairment is a "slight abnormality" which has a minimal effect on the individual such that it would not be expected to interfere with the individual's ability to work, irrespective of age, education or work experience. Bowen v. Yuckert, 482 U.S. 137, 149-151 (1987). The burden to show a medically determinable impairment is on the claimant. Id. at 146.

The ALJ found that although Dr. Polin diagnosed plaintiff with depression, the record contains no evidence that it caused limitations in activities of daily living, social functioning, concentration, persistence and pace or tolerance of stress, or that it significantly limited plaintiff's ability to perform work related activities. Also, Dr. Polin's follow-up treatment notes reported that plaintiff's affect was less depressed and that her condition improved over time. Moreover, no other physician noted symptoms of depression, let alone that depression affected her ability to perform basic work functions. In fact, Dr. Carson, her orthopedic specialist, found plaintiff alert, oriented and with

appropriate mood and affect.

When making his finding, the ALJ considered that plaintiff repeatedly refused referrals for psychological evaluation or counseling. Plaintiff admitted that she refused the referrals but had trouble concerning transportation and the costs. She claims that the ALJ failed to follow S.S.R. 82-59, stating the policy and describing the criteria necessary for finding if a failure to follow prescribed treatment is justified, when evaluating a disability. S.S.R. 82-59 applies to an individual who would otherwise be found to be under a disability and for whom treatment is expected to restore ability to work. However, if it did apply to her, her excuse of not being able to secure transportation is not a valid one recognized by the Act. Substantial evidence supports the ALJ's finding that plaintiff's depression does not rise to the level of a severe impairment.

**B. Weight of treating physician's opinions**

Plaintiff also argues that the ALJ improperly accorded more weight to the opinions of examining physicians than to the opinion of plaintiff's treating physician, Dr. Polin. Plaintiff claims that "a treating physician's report not only may be given more weight, it must be given controlling weight." 20 C.F.R. § 404.1527. "A cardinal principle guiding disability determinations is that the ALJ accord treating physicians' reports great weight, especially 'when their opinions reflect expert judgment based on continuing observations of the patient's condition over a period of time.'" Morales v. Apfel, 225 F.3d 310 (3d Cir 2000), quoting Rocco v. Heckler, 826 F.2d 1348, 1350 (3d Cir. 1987).

However, a treating physician's opinion gets controlling weight only if it is "well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence" in the record. 20 C.F.R. 404.1527

(d) (2). The ALJ was entitled to review the record in totality and discount the treating physician's opinion. See 20 C.F.R. § 416.927 (d)(2)<sup>4</sup>.

The ALJ properly evaluated all the medical evidence of record and did not rely on his speculation or credibility determinations. Although Dr. Polin, plaintiff's treating physician, opined that plaintiff was disabled, this opinion was not supported by any diagnostic testing and is inconsistent with Dr. Polin's own treatment records and the opinions of other examining specialists. The record provides no explanation or evidence of a debilitating injury and an ALJ "may afford a treating physician's opinion more or less weight depending upon the extent to which supporting explanations are provided." Plumer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999).

c. **Credibility of Plaintiff**

The ALJ properly evaluated plaintiff's subjective complaints. Social Security Regulations require a two step evaluation of subjective symptoms: (1) A determination as to whether there is objective evidence of a medically determinable impairment that could reasonably be expected to produce the alleged symptoms; and (2) an evaluation of the intensity and persistence of the pain or symptoms and the extent to which it affects the individual's ability to work. 20 C.F.R. § § 404.1529 (b), 416.929 (b). Proof of a disability may not be based solely on subjective complaints. Green v. Schweiker, 749 F.2d 1066, at 1069 (3d Cir. 1984) (citing 20 C.F.R. 404.1528 (a)). The Act requires

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<sup>4</sup> Although an opinion not for publication, we are informed by Drejka v Comm'r of Soc. Sec., 2003 U.S. App. LEXIS 2370 (3d Cir. 2003), in which the Court of Appeals for the Third Circuit distinguished Morales because there the ALJ in not deferring to the treating physician, relied only on his own personal observations, and held that an ALJ can differ from a treating physician's medical opinion when as here he relies on other evidence beyond personal observations and credibility determinations. Such other evidence can include the reports of other examining doctors and comments made by the treating physician.

objective medical evidence “showing the existence of an impairment which could reasonably be expected to produce the alleged pain.” Maloney v. Massahari, 38 Fed. Appx. 820 (3d Cir. 2002) (quoting 42 U.S.C. 423 (d) (1) (A)). In Maloney, claimant complained of back pain but after a number of tests doctors found no major damage and one doctor reported she exaggerated her symptoms. Based on this evidence, the court concluded that the ALJ was correct in determining that Maloney was not fully credible.

S.S.R. 96-7p requires that in determining the credibility of the individual, the ALJ must consider the entire record. That includes objective medical evidence, the individual’s own statements, and statements and information provided by physicians. The ALJ may also consider any personal observations in the overall evaluation of the credibility of the individual’s statements. Here, there was objective evidence of the existence of a medically determinable physical impairment which could be expected to produce some pain. However, as Magistrate Judge Scuderi reports, the record supports serious reservations regarding the alleged intensity and persistence of plaintiff’s symptoms and the extent to which it affects her ability to work. There are references to symptom magnification, medical tests showing no major injury and statements by doctors that she is capable of returning to work. The ALJ was correct in taking all this into account when considering plaintiff’s ability to perform certain activities and the inconsistent statements made concerning her level of education.

The ALJ’s decision regarding plaintiff’s subjective complaints is supported by substantial evidence. He properly considered her subjective complaints along with the other evidence in the record, and set forth a reasoned basis why the complaints were not fully credible.

v.

## **CONCLUSION**

Magistrate Judge Scuderi was correct in determining that the ALJ's decision was supported by substantial evidence and there was no legal error in analyzing plaintiff's mental impairment, in the amount of weight given to the opinions of the treating physician and in finding plaintiff's subjective complaints less than fully credible. Magistrate Judge Scuderi's recommendation will be approved and adopted. The plaintiff's motion for summary judgment will be denied, Defendant's motion for summary judgment will be granted, and the final decision of the Commissioner affirmed.